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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1937. No. 499.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT K. WURTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for Respondent.

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THE UNITED STATES OF AMERICA,
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ROBERT K. WURTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court (R. 9-11) is not reported. The opinion of the Circuit Court of Appeals (R. 15-16) is reported in 91 F. (2d) 547.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered July 13, 1937 (R. 16). The petition for a writ of

certiorari was filed on October 13, 1937, and was granted on November 15, 1937 (R. 17).

The jurisdiction of this Court is invoked by virtue of the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

Revenue Act of 1928, c. 852, 45 Stat. 791:

> Sec. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.
>
> * * * * * * * *
>
> (b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later.

Additional statutory provisions which are deemed to be essential to a proper determination of the question presented are quoted in the argument and set out in Appendix A, infra p. 33.

SUMMARY OF ARGUMENT.

Section 610 (b) of the Revenue Act of 1928 provides that where a tax has been erroneously refunded, it may be recovered by suit brought in the name of the United States "but only if such suit is begun before the expiration of two years after the making of such refund." Respondent contends that the "making" of a refund occurs

when the Commissioner approves the Schedule of Overassessments. This is the only construction of this phrase which will bring Section 610 (b) into harmony with all other sections of the Revenue Acts touching the subject. The United States contends that the "making of such refund" occurs only on the date of payment, a construction which throws the section out of harmony with all such other sections.

The basic argument for the United States throughout this case has been that Section 610 (b) is merely a statute of limitations, and that consequently the period cannot or should not start until payment because the cause of action to recover such payment does not arise until that time. At first blush, this contention appears to be plausible. But on second thought, as respondent will endeavor to show, it will be realized that the phrase "making of such refund" has a definite and unmistakable statutory meaning which fully supports respondent's contention.

The weight of the Government's argument on behalf of the United States rests wholly upon the two following premises which the United States appears to assume without discussion:

1. That Section 610 (b) relates only to instances where the "refund" in question takes the form of an actual repayment to the taxpayer;

2. That the statute in question is the same as an ordinary statute of limitations.

Both of these assumed premises are fallacious.

Regarding the first premise, the word "refund" as used in Section 610 (b) is not confined in its meaning to restitution by monetary payment. It is not there used in contra-distinction to "credit". Where the Commissioner has applied an erroneous credit, his remedy is to bring suit under Section 610 (b) or to assess a deficiency of the

tax if the time for doing so has not expired, and if the time has expired, his sole remedy is under Section 610 (b). Thus, the word "refund" in this section is used as descriptive of the act of the Commissioner in determining that there has been an overpayment. This act of the Commissioner occurs when he approves the Schedule of Overassessments.

This court and the lower courts have held (in cases more fully discussed in argument) that the crediting of an overpayment is payment of the tax against which such credit is applied, and, that payment in such cases occurs when the Schedule of Overassessments is signed by the Commissioner. Even assuming in full the Government's own analogy between Section 610 (b) and an ordinary statute of limitations, it would follow that in cases of credits, the two year period starts when the Commissioner approves the schedule of overassessments. Is a distinction to be made in this respect between refunds which result in credits and refunds which result in cash payments? Such a distinction, similar in every practical aspect, between "refunds" which result in credits and those which result in refund by actual payment was urged by the Government in *U. S. v. Swift & Co.*, 282 U. S. 468, but denied by this court in favor of a construction of the act which "brings about uniformity in administration, as it makes the allowance of credits and refunds simultaneous".

Regarding the second premise, stated supra, on which the Government's main argument appears to be based, what has already been said illustrates in part the fallacy in assuming that Section 610 (b) is the same as an ordinary statute of limitations. An ordinary statute of limitations assumes that a cause of action has arisen, but cannot be enforced if the defendant pleads the statute in bar. Section 610 creates a statutory right for recovery by suit for erroneous refunds conditioned upon beginning suit within two years—not after the cause of action arises, but within two years after the "making of such refund".

The fallacy of the Government's argument arises from postulating that no recovery by suit can be had until payment (true); that therefore the limitation period must run from the time of payment (false); and that therefore the phrase "making of the refund" must refer to the time of payment (false). This reasoning begs the question because it ignores the fact that the "making of such refund" does not refer to time, but to an act with respect to which actual payment to the taxpayer may be the consequence, or may not be the consequence as in the case of a credit. This is true whether Section 610 be construed as a statute of limitations or as a condition which must be affirmatively shown to be complied with to support the right of recovery. We need look no further than the Revenue Act itself to find further illustrations of the same situation. For many years the Revenue Acts provided that the time within which a taxpayer could institute proceedings for refund started "from the date when the return was due". Section 252 of the 1918 Act, c. 18, 40 Stat. 1057; Sec. 252 of the 1921 Act, c. 136, 42 Stat. 227. Under the Revenue Acts now in effect, the period starts with the filing of the return or the date of payment, whichever is most advantageous to the taxpayer. These afford additional instances wherein the time to institute proceedings for recovery of an erroneous payment may start before payment has been made, and illustrate that the fixing of such dates are purely matters of arbitrary statutory determination.

It is immaterial and argues neither one way nor the other that the Commissioner remains in control of the situation for a period after the Schedule of Overassessments has been signed, and could prevent delivery of the check or cause payment to be stopped. To advance this as an argument against respondent is to assume the point to be proved. If the "making of such refund" occurs when the Schedule of Overassessment is approved, the power of the Commissioner to head off the check before delivery is a

circumstance amounting to no more than an additional remedy available to him by way of self help, making it unnecessary to bring suit. On the other hand, if the "making of such refund" occurs with payment, then of course it follows that he could exercise such power before the refund is made. The question still remains, when does the "making" of a refund occur, and if it does occur when the Schedule of Overassessments is approved, as respondent contends, it is immaterial that the Commissioner continues to have power to undo it, for the legal effect of an act of the Commissioner performed under statutory authority must be fixed as of the time the act is done, and cannot be affected *nunc pro tunc* by some subsequent event.

For these reasons respondent submits that no proper analogy can be drawn between Section 610 (b) and an ordinary statute of limitations. The Section should not and cannot intelligibly be viewed or construed as a separate statute. If construction is necessary, resort should be had, not to such analogies drawn from other and unrelated fields of the general law, but to the Revenue Acts of which it is a part.

The foregoing states in outline the reasons why respondent believes that the two main premises on which the Government's principal contention is based are without merit.

A reference to other sections of the Revenue Acts dealing with cognate matters shows unquestionably that the "making of such refund" occurs when the Schedule of Overassessments is approved. This is the only construction of this phrase in Section 610 (b) which will bring that section into harmony with all other sections of the Revenue Acts touching the subject, not in harmony merely with respect to the technical meaning of words, but in harmony with respect to actual operation, purpose and effect, whereas the Government's contention throws the section out of harmony with all such other sections.

The Circuit Court in the present case referred to Sec-

tion 1104 of the Revenue Act of 1932 (and House and Senate Committee Reports in regard thereto) which provides that the date of the "allowance" of a refund is the date when the Commissioner approves the Schedule of Overassessments. The Court states that this section as explained by the Committee Reports lends "additional weight to the theory that the refund is made when the schedule of overassessments is signed." The determination of the issue presented to this court does not depend merely on the question whether Section 1104 is or is not applicable. Respondent does not rely on Section 1104 in the sense that it amends Section 610 (b). Respondent believes that the making of a refund occurs when the Schedule of Overassessments is signed, for numerous reasons independent of Section 1104, but submits that Section 1104 serves to remove any doubt there may otherwise have been in this respect. Respondent's position here is that if Section 1104 is applicable then the Circuit Court was correct in its conclusion for that and other reasons.

By its contention the Government would appropriate to itself the power to delay indefinitely the "making" of a refund, if the quoted word means "payment". This would inject into the administrative procedure a floating time element which would break the otherwise perfect continuity of time between the time of payment by the taxpayer and the expiration of the time within which the Government could sue to recover its erroneous refund. Under respondent's version, there is a beginning and an end fixed by the statute,—each successive time period starts where the preceding one left off. This imparts to the statute the highly desirable element of certainty. Under the Government's version the Commissioner could delay indefinitely in permitting the refund check or the certificate of overassessment to be delivered, although the claim had long since been approved on its merits. Furthermore, respondent's contention is more favorable to the Government than its own, from the point of view of administrative convenience. The time when the Schedule of Overassessments is approved is

peculiarly within the knowledge of the Commissioner as it is a matter of record in his own office, and readily available at all times. It is a time certain. The time when payment occurs is peculiarly within the knowledge of the taxpayer. The period in question runs against the Government,—not the taxpayer. Also, the time of payment is not a time certain. In the present case, the Government argued before the District Court that the date of the refund check controls. Before the Circuit Court it argued that the date of the delivery of the refund check is the controlling date. Before this court it is arguing that it is the date of "payment", whatever that may mean. Is the Commissioner to enquire from taxpayer when he received the check,—or ferret out the check voucher to determine when it was cashed? This is not merely a question of repose to taxpayers. If it is appropriate for the Government to argue what the law should be instead of what the statute provides, then it is equally appropriate for respondent thus to point out that his contention would result both in greater administrative convenience and in greater certainty.

If this court is of the opinion that Section 610 (b) is of doubtful meaning, such doubt should be resolved in favor of the taxpayer and against the Government. The usual rule requiring that a liberal construction favorable to the sovereign be given to statutes in derogation of sovereign rights has no application in the case of revenue laws. This court held in *U. S. v. Updike*, 281 U. S. 489, 496, that the rule requiring taxing acts to be construed liberally in favor of the taxpayer is equally applicable to provisions of limitations embodied in such taxing acts, and the rule of the Updike case has already been applied to Section 610 (b) itself by the Circuit Court of the Sixth Circuit.

ARGUMENT.

THE MAKING OF THE REFUND OCCURRED WHEN THE COMMISSIONER SIGNED THE SCHEDULE OF OVERASSESSMENTS.

A.

The Government's main contention in this case is that the period of limitations for the recovery of an erroneous refund should start with payment of the amount sought to be recovered, as that is when the cause of action would accrue, and that consequently the word "making" as used in Section 610 (b) of the Revenue Act of 1928, infra p. 37, should be construed to mean "payment". Section 610 (b) provides that such actions may be brought in the name of the United States "but only if such suit is begun before the expiration of two years after the making of such refund . . . ."

In both lower courts the first reaction appeared to favor this contention, the mere statement of which seems plausible enough, but on second thought both lower courts experienced a change in opinion and sustained respondent's contention that the "making of such refund" occurs when the Commissioner signs the Schedule of Overassessments.

The Government's analogy to the usual or ordinary statute of limitations assumes the propriety of wholly removing Section 610 (b) from its proper position in the sequence of other sections of the Revenue Acts dealing with cognate matters, and treating the section as if it were a separate and complete statute in itself. Respondent believes this is an entirely unwarranted approach to the problem and that Section 610 (b) should be recognized as what it is and what it was intended to be,—an integral part of a Revenue Act, dealing with but one of several phases of the general subject of overpayments. That this is the proper principle seems all the more clear when the very words in question are found in numerous other sections of the Rev-

enue Acts. Respondent's approach to the problem recognizes this principal, and respondent's construction of the phrase "making of such refund" is the only construction which will bring Section 610 (b) into harmony with all other sections of the Revenue Acts dealing with the subject. At the same time, respondent believes and will show that the Government's construction of the words in question would throw Section 610 (b) out of harmony with such other sections.

The phrase "making of such refund", as used in Section 610 (b) of the Revenue Act of 1928, has a definite statutory significance which involves not only the meaning of the word "making" but also the meaning of the word "refund". These words, as previously stated, are also found in numerous other sections of the Revenue Acts, resort to which may and should be had in order to discover their meaning. "In the absence of anything in the statute clearly indicating a contrary intent, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and where its meaning in one instance is clear, this will be attached to it elsewhere." 59 C. J. 1003, citing *Pampanga Sugar Mills v. Trinidad,* 279 U. S. 211, and *Lewellyn v. Harbison.* 31 F. (2nd) 740, cert. den. 280 U. S. 560.

A comparison of Sections 607, 608 and 609 of the Revenue Acts of 1928 (infra pp. 35, 36) and of cetrain other sections, as indicated, will show that the word "refund" is used throughout the Revenue Acts with distinctly different meanings.

Section 607 defines certain overpayments, and directs that they be "credited or refunded." Here, the word "refunded" is used in the sense of "repaid in cash". Section 608 provides that a "refund . . . made" after the enactment of the 1928 Act shall be considered "erroneous" under certain defined conditions. Here, the word "refund" is not confined in its meaning to "repaid in cash." As used here it refers to the fact of overpayment, and the act of the

Commissioner in determining such fact, which is to be adjusted as directed in Section 607 by being "credited or refunded (repaid in cash)." In other words, Section 608 deals with certain erroneous "refunds" which have either been credited or repaid in cash. Section 609 (b) states that a credit of an overpayment against any tax shall be void if a "refund" of such overpayment would be considered erroneous under Section 608. Here, as in Section 607, the word "refund" is used to mean "repaid in cash". Section 322 (a) of the 1928 Act (infra p. 34) provides that overpayments shall first be credited against other taxes due, and the balance be "refunded." As here used, again, the meaning is "repaid in cash."

In which of these two senses is the word "refund" used in Section 610 (b)?

Respondent submits that it is there used, as in Section 608, as descriptive of the act of the Commissioner in determining that there has been an overpayment.

If the word is used in Section 610 to mean "repayment in cash" it must follow that the section is applicable only in instances where the overpayment has resulted in a repayment in cash. That Section 610 has no such narrow scope will appear from a reference to cases involving erroneous credits.

If it is determined by the Commissioner that any part of an amount which has been credited against other taxes due has been erroneously considered as an overpayment, then the Commissioner has two alternative remedies, depending on the facts, as follows:—

1. If the period of limitation for assessment of the tax against which the credit was applied has not expired, he may proceed with the determination of a deficiency and assessment in the usual way. *Burnet v. Porter*, 283 U. S. 230; *McIlhenny v. Com.*, 39 F. (2d) 356, and cases there cited, particularly *Austin Co. v. Com.*, 35 F. (2d) 910.

2. If the period of limitation for proposing a deficiency has expired, the Government may sue under Section 610, *Western Wholesale Drug Co. v. U. S.*, 47 F. (2d) 770, and this Section now affords the exclusive remedy, *Hartford-Connecticut Trust Co. v. Eaton,* 8 Fed. Supp. 218.

Clearly, then, Section 610 includes within its scope all actions to recover erroneous "refunds" including those which have been accomplished by credit as well as those which have been accomplished by repayment in cash. The word is there used to describe the act of the Commissioner in determining that there has been an overpayment. This act itself is the "refund" and, as will be more fully developed, it occurs when the Commissioner signs the Schedule of Overassessments.

B.

In view of this meaning of the word "refund", as used in Section 610 (b), the question naturally arises, when would the period start in cases where the refund has taken the form of a credit? This, in turn, under the Government's theory, involves the question whether the application of a credit constitutes payment, and if so, on what date it occurs.

The collection of a tax due for one year by credit of a refund or overpayment for another year constitutes payment of the tax against which the credit is made just as effectively as if the refund had been paid in cash and in turn paid by the taxpayer to the Collector. "When the collector applied part of the money, which was due on the refund, to another tax, the relation of plaintiff and defendant to the transaction so far as this question is concerned (application of Sections 609 and 610 of the 1928 Act) was in law the same as if the Collector had received cash from the plaintiff." *Boston Pressed Metal Co. v. U. S.*, 42 F. (2d) 312 (1930) (Ct. of Cl.), aff'd, 282 U. S. 409. To the same effect

are *U. S. v. Swift & Co.*, 282 U. S. 468 (1931); *U. S. v. Reeves Bros. Co.*, 83 F. (2d) 121 (C. C. A. 6th); *Consolidated Paper Co. v. U. S.*, 59 F. (2d) 281 (Ct. Cl.); *Western Wholesale Drug Co. v. U. S.*, 47 F. (2d) 770 (D. C. So. Calif.); and *Jenkins S. S. Co. v. Routzahn*, 46 F. (2d) 548 (D. C. North. Ohio), wherein the court states, "When the government withheld the money and applied it in satisfaction of the penalty, it effected collection of the penalty exactly as if it had received plaintiff's check." And in *McEachern v. Rose*, 58 S. Ct. 84, No. 6, present term, decided Nov. 8, 1937, this court again recognized that the application of a credit is the payment of the tax against which the credit is applied.

To be consistent with its position in the present case, and in view of the fact that a credit is payment, the Government must contend that in the case of a credit the two year period starts from the date the payment is thus constructively made to the taxpayer. When does such constructive payment occur?

Under the decisions of this court payment through the application of a credit occurs when the Commissioner signs the Schedule of Overassessments.

In *U. S. v. Swift & Co.*, supra, the taxpayer filed a claim for refund of an amount which it had not paid in cash but which consisted of a credit of an amount overpaid for other taxable years. Section 252 of the Revenue Act of 1921 provided that overpayments be credited against taxes due, and the balance refunded. Section 284 (b) (1) of the Revenue Act of 1926 provided "no such credit or refund shall be allowed or made after . . . four years from the time the tax was *paid* . . . unless before the expiration of such period a claim therefor is filed by the taxpayer: . . ." (italics ours). The question was whether the refund claim was filed in time, and this depended upon the time when the application of the credit became effective as *payment*. This court held that *payment* of the tax against which the credit was applied occurred when the Commissioner signed the sched-

ule of refunds and credits. The practice has since changed, and the Commissioner no longer signs the schedule of refunds and credits. Under the practice prevailing throughout this case, the corresponding act is the signing of the Schedule of Overassessments.

In *McEachern v. Rose,* supra, one of the questions before this court was whether credits for overpayments of tax for certain years could be applied against taxes due for a preceding year where it appeared that recovery of the tax for such preceding year was barred. In the course of its opinion this court states:

> "Both section 322 and section 609 contemplate that the time of credit of an overpayment in one year against tax for another is to be marked by some definite administrative action. This Court, upon an examination of the established practice in the Bureau of Internal Revenue, concluded that the time of allowance of a refund and the time of credit of an overpayment against a tax due, is the date of approval by the Commissioner of the schedule of refunds and credits prepared by the collector, showing the amount due the taxpayer, rather than the earlier date of the certification by the Commissioner to the collector, of the schedule of overassessments. See United States v. Swift & Company, 282 U. S. 468, 51 S. Ct. 202, 75 L. Ed. 464; Girard Trust Company v. United States, 270 U. S. 163, 46 S. Ct. 229, 70 L. Ed. 524. We accordingly held that approval of the schedule of refunds and credits fixes the date from which interest is allowed upon any balance refunded to the taxpayer, Girard Trust Company v. United States, supra, and the date from which the statute of limitations runs against the taxpayer's right to demand refund of a tax paid by the allowance of a credit. United States v. Swift & Company, supra.
>
> "After these decisions section 1104 of the Revenue Act of 1932, c. 209, 47 Stat. 287 (26 U. S. C. A.

Sec. 1670 (3), changed the date which should be deemed to be the time of allowance of the credit or refund within the meaning of that and earlier revenue laws. It provided that: 'Where the Commissioner has (before or after the enactment of this Act (June 6, 1932)) signed a schedule of overassessments in respect of any internal revenue tax imposed by this Act (the Revenue Act of 1932), or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax.'

"The date of the claim for refund and the date of the allowance of the credit which, according to section 1104, was that of the approval by the Commissioner of the schedule of overassessments, came after recovery of the 1928 tax was barred. If petitioner had then paid the tax he could have recovered it back as an overpayment under section 607; accordingly, credit against the tax of the 1929 overpayment is prohibited by section 609, as are like credits for the overpayments of 1930 and 1931."

It follows, then, that the application of a credit is payment of the tax to which it is applied, and that such payment occurs when the Commissioner signs the Schedule of Overassessments. Thus, even assuming the full application of the Government's own contention which places such conclusive weight on the date of payment, under these decisions, in the case of a credit, the two year period of Section 610 (b) would start from the date of the signing of the Schedule of Overassessments because, in the case of a credit, that act fixes the date of payment.

Is a distinction to be made in this respect between refunds which have resulted in credits and refunds which have resulted in payments? Assume the case, of common occurrence, where a refund has been applied in part as a

credit and the balance as a payment. Should the two year period start from the signing of the Schedule of Overassessments with respect to the portion credited, but not until the date of actual payment with respect to the balance of the refund?

This is precisely the sort of inconsistency which this court has already condemned. In *Girard Trust Co. v. U. S.*, 270 U. S. 163, the question arose as to the interpretation of the Revenue Act of 1921 which provided that, upon the allowance of a claim for refund, interest shall be allowed and paid "to the date of such allowance." This Court held that the date in question was not the date of actual repayment, nor the date on which the Commissioner first decides that there has been an overassessment and refers the matter to the Collector for examination and report, but the date on which the Commissioner approves the amount thus ascertained for payment. In *U. S. v. Swift & Co., supra*, as already stated, it was necessary to determine the date of the allowance of a credit in order to determine the date from which the statute of limitations runs against the taxpayer's right to demand refund.

The Government, in the Swift case, sought to differentiate the Girard case on the ground that there the date of the allowance of a refund was in question; whereas, the Swift case involved the allowance of a credit. In denying that any such distinction exists the court states:

> "This construction" (i. e., the court's) "of the act brings about uniformity in administration, as it makes the allowance of credits and refunds simultaneous."

C.

Let us next consider the meaning of the word "making" as used in Section 610 (b). Respondent readily concedes that the phrase "making of such refund", when the remainder of the text of the section and of the Revenue Act is ignored, could mean "payment of such refund", pro-

vided "refund" is taken to mean the same as "repayment in cash". But here, again, any such abstract examination of the phrase seems entirely unwarranted. We have already shown that "refund" as used in Section 610 (b) refers to the fact of overpayment, and the determination of such fact by the Commissioner,—it refers to a fact with respect to which actual payment to the taxpayer may be the consequence, or may not be the consequence as in the case of credits. When the word "refund" is understood as having this meaning the word "making" becomes meaningless when construed as "payment".

Variations of the word "made" are found in numerous other sections of the Revenue Acts dealing with various phases of refunds and credits and which have been interpreted by this and lower courts. We now refer to such other sections not merely as haphazard instances where the words in question are used in the same sense that respondent ascribes to them in Section 610 (b), but, what is more important, to demonstrate additional situations where the Government's construction would bring Section 610 (b) into conflict with the operation and purpose of such other sections.

Respondent submits that there is no distinction in point of time between the "making" and the "allowance" of a refund which may later result in credit or payment.

Section 322 (b) (1) of the Revenue Act of 1932 provides,

> "Section 322. Refunds and Credits.
>
> (b) Limitation on Allowance.
>
> (1) Period of Limitation.—No such credit or refund shall be *allowed or made* after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer." (These provisions were changed by amendment in 1934, but the changes in no way affect the point under discussion. Italics are ours.)

Section 1104 of the 1932 Act, infra p. , fixes the "date of *allowance* of refund or credit" as the date when the Commissioner first signs the schedule.

The Senate Finance Committee explains, infra p. 40, that the purpose of enacting Section 1104 was not only to clarify the date in question in view of the change in the administrative procedure, but also to protect taxpayers who might not be aware of their right to a refund in time to file their claim within two years after the tax was paid. Under Section 322 (b) (1), just quoted, either the taxpayer must file his claim within two years after the tax is paid or the Commissioner must *make* the refund within that period. If the purpose of Section 1104 is to permit the Commissioner to accomplish a refund at the earlier date by signing the schedule (and the Senate Finance Committee Report declares this to be the purpose) and thus favor small taxpayers who might not be aware of their rights, then it must follow that a refund is "made" when it is "allowed". A contrary construction would nullify the purpose of Section 1104 by postponing the "making" of the refund until the later date when payment occurs, and the effect of Section 1104 as desired and intended by Congress would thus be lost, because it might then be too late legally to make the refund. Such a contrary construction should be avoided, as a statute should be construed in a sense that will effect the legislative purpose: *U. S. v. Katz*, 271 U. S. 354. The intent of Congress is the goal of inquiry in interpreting statutes: *Hughes v. Commissioner*, 38 F. (2d) 755. Committee Reports in explanation of the purpose and design of specific provisions of the Revenue Acts are considered as deserving of peculiar authority in the construction of such provisions: *Hecht v. Malley*, 265 U. S. 144; and reference is frequently made to them, *Burnet v. S. & L. Building Corp.*, 288 U. S. 406.

Section 322 (b) of the Revenue Act of 1934 (with immaterial exceptions the same as in Revenue Acts of 1928 and 1932) provides in part:

"(1) . . . No credit or refund shall be *allowed* or *made* after two years from the time the tax was paid . . .

"(2) The amount of the credit or refund shall not exceed the portion of the tax paid . . . during the three (two years, prior to 1934) years immediately preceding the *allowance* of the credit or refund."

Section 322 (d) provides, in part:

"(d) . . . No such credit or refund shall be *made* of any portion of the tax unless . . . etc." (Italics ours)

From the foregoing it seems that, generally speaking, credits are "allowed" and refunds are "made". In the single section just quoted, credits are referred to as being "allowed" and refunds as "made"; both credits and refunds are then referred to as "allowed"; and finally, both are referred to as being "made". The conclusion is irresistible that the words are used interchangeably and entirely without any distinction in meaning.

Section 322 (b) of the Revenue Act of 1934 further provides that unless a claim for credit or refund is filed within three years after the return was filed or within two years after the tax was paid no credit or refund shall be "allowed or made" after the expiration of whichever of such periods expires the later. It cannot be argued sensibly that, for purposes of refunds which result in credits, the elapsed time is to be measured up to the date when the Commissioner signs the schedule of overassessments, but for purposes of refunds which result in repayments it is to be measured up to the date of the refund check or the date when it is delivered or paid. This is an additional instance of inconsistency of precisely the same sort condemned by this court in *U. S. v. Swift & Co., supra.* A statute should be construed, if possible, in a way that

avoids absurd or illogical consequences, *In re Blalock*, 31 F. (2d) 612 (1929), and in the sense that best harmonizes with all other parts of the statute, *United States v. Baltimore & Ohio Ry. Co.*, 159 Fed. 33, decree modified in other respects 220 U. S. 4 (1911).

Perhaps even more conclusive proof in support of respondent's contention is found by reference to Section 608 of the Revenue Act of 1928.

As previously shown, where payment of the tax for which the refund claim is filed has been accomplished through application of a credit, the time starts against the taxpayer on the date when the Schedule of Overassessments was signed. Also, where no claim for refund was filed, the signing of the Schedule of Overassessments before the time expires for filing the refund claims satisfies the mandate of the statute that the credit or refund be "allowed or made" before the expiration of that period. To supplement this, Section 608 of the 1928 Act, defining certain types of erroneous refunds provides, inter alia, "A *refund* . . . shall be considered erroneous . . . if *made* after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed . . .". Assume the case where a Schedule of Overassessments is signed on March 10; the time for filing a refund claim expires March 15; no refund claim was filed; the taxpayer owes no other tax; and the refund check has not been delivered. According to respondent's construction, the subsequent delivery and payment of the refund check after March 15 would not result in an "erroneous refund" for which the United States could bring suit under Section 610, notwithstanding the fact that under Section 608 any "refund . . . made" after March 15 would be an "erroneous refund". Under the Government's construction, although the "refund" was "made" on March 10 for purposes of satisfying the time requirement of Section 322 (b) (1), still, payment after March 15 would render the same refund erroneous under Section 608,

and suit could then be instituted under Section 610. This illogical consequence must follow unless some further distinction is to be made between the meaning of "refund" and "made" as used in Section 608, and the same words used in Section 610. Respondent believes that all of the various sections discussed in this brief are *in pari materia* and are inter-related because they deal with various phases of overpayments. The Government claims that Section 1104 of the 1932 Act, and perhaps Section 322 of the 1928 and 1932 Acts, are not *in pari materia* with Section 610 of the 1928 Act. Whichever of these opposed views may be correct, there can be no doubt whatever that Sections 608 and 610 of the 1928 Act are *in pari materia*. In fact, Section 610 (a) and (b) both refer in specific terms to Section 608. Nor can there be any doubt that the words in question are used in the same sense in both of these sections.

With the exception of the Paulson decision, discussed hereafter, the cases consistently hold that credits and refunds are allowed or made as a result of the same administrative act, and that in either case this occurs when the Commissioner officially approves the amounts to be credited or refunded.

In *Girard Trust Co. v. U. S., supra*, in holding that where interest on a refund is to be allowed to the date of the allowance of the claim, it is to be computed to date when the Commissioner approves the amount to be repaid, states, at p. 169,

> "If Congress had intended that interest should be allowed to the date of payment, it seems to us it would have said so."

Similarly, if Congress had intended that the period provided in Section 610 of the Revenue Act of 1928 should begin on the date when the refund check is issued, or when it is delivered, it seems that it would have said so.

Elsewhere in the Revenue Act Congress has chosen to make itself perfectly clear on that point. Section 614 of the Revenue Act of 1928 (still in effect) provides:

"Section 614. Interest on Overpayments.

"(a) Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax, at the rate of 6 per centum per annum, as follows:

* * * * * * * *

"(2) In the case of a refund, from the date of the overpayment *to a date preceding the date of the refund check* by not more than 30 days, such date to be determined by the Commissioner.

* * * * * * * *

"(d) Subsections (a), (b), and (c) shall take effect on the expiration of thirty days after the enactment of this Act, and shall be applicable to any *credit taken or refund paid* after the expiration of such period, even though allowed prior thereto."

(Italics ours)

Here Congress has made its meaning clear by resorting specifically to the date of the refund check, and by referring to this date as the date when the refund is *paid*.

Thus, not only is the construction of the word "made" as urged by respondent wholly consistent with other provisions of the Act where its meaning is now beyond question, but Congress has chosen wholly different words to describe a date which occurs after the credit or refund is allowed or made. Clearly, the expression "credits or refunds allowed or made", which is used so frequently throughout the statute, acquires a definite meaning when contrasted with the expression "credit taken or refund paid" as found in 614 (d) of the Revenue Act of 1928, supra.

An additional instance of the same character is found in the very section under discussion as amended by Section 803 of the Revenue Act of 1936. This section of the 1936 Act provides:

"Section 803. Interest on Erroneous Refunds.

"(a) Section 610 of the Revenue Act of 1928, as amended, is amended by adding at the end thereof a new section to read as follows:

'(d) Erroneous refunds recoverable by suit under this section shall bear interest at the rate of 6 per centum from *the date of the payment of the refund.*' "
(Italics ours)

Surely, according to established principles of statutory construction this change in phraseology in the same section from the word "making" to the word "payment" clearly imports a difference in meaning. The distinction becomes all the more significant when it is considered that both words are used for fixing the date from which certain periods of time are to be calculated,—in the one case to determine when the action must be started, and in the other to determine from what date interest runs. These dates were not intended to be the same, because different words are used to describe them.

The Government cites two instances in which the word "made" or some variation of it is used in the sense of "paid". One such instance is found in the Report of the House Committee (H. Rep. No. 2, 70th Cong., 1st Sess., p. 35) explaining the change from Section 1116 of the 1926 Act to Section 614 of the 1928 Act wherein it is stated:

"The principal change made in existing law is that in the case of a refund the interest period now terminates with the *allowance* of the refund, a date which often *precedes* the actual *making* of the refund

> by a considerable period of time and thus deprives the taxpayer of interest during that period. Under the above provision of this bill, interest runs to a date not more than 30 days preceding the date of the refund check, such date to be determined by the Commissioner. This provision is administratively practicable and it will result in giving the taxpayer interest to within approximately 30 days of the *date of the refund.*"
>
> (Italics supplied)

As here used, the word "making" is intended to be used in the sense of "payment", and in order to avoid confusion that might otherwise result, the author of the report has preceded the word "making" by the word "actual".

The second instance cited by the Government is Section 710 of the Revenue Act of 1928, which provides:

> "No *refund or credit* of any income, war-profits, excess-profits, estate or gift tax, in excess of $75,000, shall be *made* after the enactment of this Act, until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Commissioner of Internal Revenue is submitted to the Joint Committee on Internal Revenue Taxation. . . ."
>
> (Italics supplied.)

The Government in its brief, at p. 21, states that it is "informed" that the report is made to the Joint Committee on the date the Commissioner signs the Schedule of Overassessments; that this practice has the approval of the Joint Committee; and relies on this as showing that refunds and credits are not *made* until payment occurs, some time after the Schedule is signed.

It may be that here, again, the word "made" means "paid". The act sought to be forestalled until the 30 days had expired is the act of delivery of the certificate of overassessment accompanied by the refund check or indicating the credit. It will be observed that "refund" is used three times in this section in contradistinction to "credit", and therefore in the sense of "repaid in cash". As previously explained, when "made" is coupled with this meaning of "refund" it may mean "paid", as in this section. Furthermore, it would seem foolish to have such reports made to the Joint Committee until after the claims had been disposed of on their merits.

At most, the House Committee Report on Section 614 of the 1928 Act, and Section 710 of the 1928 Act, just discussed, are simply illustrations of instances where "made" happens to be used in a manner indicating that it means payment. In both instances, such meaning may be recognized as being fully consistent with the legislative purpose and without bringing the section into conflict and disharmony with other sections. By no means does it follow that the same meaning is to be carried over to other sections, such as 610 (b), where it is perfectly clear that the word or words are used in an entirely different sense, particularly where such other meaning serves the commendable purpose of certainty and of harmonizing all sections in which the words are used.

D.

Additional inconsistencies which would be avoided through adoption of respondent's contention will be observed by considering the successive periods of time between the original filing of the return and payment of the tax and the final suit to recover an amount which has been erroneously refunded by credit or by payment.

The taxpayer must file a claim for refund within three

years from the filing of the return or within two years after payment, whichever is the later. Section 322 (b) of the 1936 Act. Where no refund claim is filed by the taxpayer (as in the present case), the Commissioner may voluntarily determine that there has been an overpayment, but in such case the ensuing credit or refund must be allowed or made before the expiration of the time within which the taxpayer could file a claim. Section 322 (b) (1) of the 1936 Act; Section 1104 of the 1932 Act.

Since the act of the Commissioner in signing the Schedule of Overassessments is the only act required to be done before the period against the taxpayer has expired, it is natural and logical to expect that the next following period against the United States would start where the preceding period against taxpayers ended, and as a result of the same act. By its contention the Government would invest itself with the power to prolong indefinitely the beginning of the period, and thus inject a floating period of time which seems entirely foreign to the purpose of Section 610, and which would break the otherwise perfect continuity between the time the tax is paid and the expiration of the time within which the Government could sue to recover its erroneous refund. Under respondent's version, there is a beginning and an end fixed by the statute,—each successive time period starts where the preceding one left off. This imparts to the statute the highly desirable element of certainty. Under the Government's version the Commissioner could delay indefinitely in permitting the refund check or the certificate of overassessment to be delivered, although the claim had long since been approved on its merits. Furthermore, respondent's contention is more favorable to the Government than its own, from the point of view of administrative convenience. The time when the Schedule of Overassessments is approved is peculiarly within the knowledge of the Commissioner as it is a matter of record in his own office, and readily available at all times. It is a time certain. The

time when payment occurs is peculiarly within the knowledge of the taxpayer. The period in question runs against the Government,—not the taxpayer. Also, the time of payment is not a time certain. In the present case, the Government argued before the District Court that the date of the refund check controls. Before the Circuit Court it argued that the date of the delivery of the refund check is the controlling date. Before this court it is arguing that it is the date of "payment", whatever that may mean. Is the Commissioner to enquire from taxpayer when he received the check,—or ferret out the check voucher to determine when it was cashed? This is not merely a question of repose to taxpayers. If it is appropriate for the Government to argue what the law should be instead of what the statute provides, then it is equally appropriate for respondent thus to point out that its contention would result both in greater administrative convenience and in greater certainty.

In this same connection, the Government urges the point that it is something akin to foolishness to suppose that the period of limitations in question starts before the taxpayer knows anything about what has taken place. But this is precisely the case in the converse situation. Where a tax due has been paid by the application of a credit the period against the taxpayer for filing a refund claim of such tax runs from the date the Schedule of Overassessments is signed. *U. S. v. Swift & Co.*, supra. If hardship is to be weighed, it seems the greater in such a case, because the controlling date is peculiarly within the knowledge of the Commissioner whereas the limitation is running against the taxpayer. Furthermore, according to the Government's version, Section 610 (b) should be construed in favor of the party making the mistake.

The case of *Paulson v. U. S.*, 78 F. (2d) 97, is contrary in its reasoning to respondent's contention and supports the contention of the Government. Both the District Court (R. p. 11) and the Circuit Court (R. p. 16) distin-

guish the Paulson case on the ground that the facts therein arose prior to the enactment of Section 1104 of the 1932 Act. The Circuit Court states that "Light is thrown upon the Congressional intent" by Section 1104 and that "Committee Reports of both Senate and House lend additional weight . . ." in favor of respondent's construction of Section 610. It seems immaterial now to consider whether the decision of the Circuit Court in this case is or is not in conflict with the Paulson decision. Respondent's position respecting the Paulson case is that for all of the reasons recited in this brief the case was wrongly decided, but that the court might have reached the opposite conclusion if Section 1104 had been applicable to the facts before it.

Respondent does not rely on Section 1104 of the 1932 Act in the sense that it amended Section 610 of the 1928 Act. The arguments advanced in this brief are equally applicable to the various sections of the Acts as they stood both before and after the enactment of Section 1104 in 1932. Section 1104 of the 1932 Act was enacted to give statutory recognition to the changed administrative practice under which the Commissioner no longer signs the Schedule of Refunds and Credits and under which the final act of the Commissioner in disposing of refund claims on their merits occurs when he signs the Schedule of Overassessments. But with or without Section 1104 respondent submits that, for the reasons herein discussed, the period in question starts from that date.

ANY DOUBT AS TO THE MEANING OF SECTION 610 SHOULD BE RESOLVED IN FAVOR OF THE TAXPAYER.

Respondent believes that the limitation period clearly starts with the signing of the Schedule of Overassessments. But if this court entertains any doubts on the subject, respondent submits that such doubt should be resolved in its favor.

United States v. Updike, 281 U. S. 489 (1930), involves an interpretation of Section 278 (d) of the Revenue Act of 1926 relating to the limitations on the bringing of suits by the Government after assessment. In holding that the suit in question was barred the court states, at p. 496:

> ". . . We think this is the fair interpretation of the clause, and one which must be accepted, especially in view of the rule which requires taxing acts, *including provisions of limitations embodied therein*, to be construed liberally in favor of the taxpayer. *Bowers v. New York & Albany Co.*, 273 U. S. 346, 350."
>
> (Italics ours.)

And in *United States v. Steel Furniture Co.*, 74 F. (2d) 744, (C. C. A. 6th Cir.) (1935), referring specifically to Section 610 of the Revenue Act of 1928, the court states:

> "The statute was evidently enacted to grant taxpayers repose from suits for erroneous refunds made by the Government. *Being a part of a taxing act, it is to be given a liberal construction in favor of the taxpayer.* W. P. Brown & Sons Lumber Co. v. Commissioner, 38 F. (2d) 425, 428, so far as it is to be construed as holding differently, must be deemed to have been overruled by Bowers v. New York & Albany Co., 273 U. S. 346, 350, and United States v. Updike, 281 U. S. 489, 496."
>
> (Italics ours.)

Taxpayer recognizes the established general principle of law that statutory provisions derogatory to sovereign rights must be construed strictly in favor of the sovereign, *United States v. Nashville, etc., Ry. Co.*, 118 U. S. 120 (1886); *duPont De Nemours & Co. v. Davis*, 264 U. S. 552 (1924). But these cases do not involve federal revenue laws. As shown by *U. S. v. Updike* and *U. S. v. Steel Furniture Co., supra*, the rule is the contrary where the statute in question is a part of a revenue measure.

Respondent submits that the rule favoring the taxpayer is no less applicable merely because prior to the enactment of Section 610 of the 1928 Act the Government had a right of action to recover money paid out of the public treasury as a result of a mistake of fact or law. That remedy was not limited in its scope to the recovery of taxes erroneously refunded by credit or in cash. Whatever that remedy was prior to the enactment of Section 610, the remedy is now exclusively statutory in all cases where the Government seeks to recover a ". . . tax . . . which has been erroneously refunded . . ." (Section 610 (b)). *Hartford-Connecticut Trust Co. v. Eaton*, supra. The present suit was instituted under Section 610 (b) which, as stressed throughout this brief, should be recognized for what it is, —an integral part of a Revenue Act.

In the *Updike* case, which respondent submits controls in its favor the question under discussion, the suit was against stockholders as transferees of the assets of a dissolved corporation taxpayer which had failed to make a return for the period of 1917 prior to dissolution in the manner prescribed by a certain regulation promulgated under the Revenue Act of 1917. The suit was brought more than six years after assessment, and the question was whether it was barred by the following provisions of Section 278 of the 1926 Act:—

> "(a) In the case . . . of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.
>
> • • • • • • • • •
>
> "(d) Where the assessment . . . has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within

six years after the assessment of the tax. . . . U. S. C. Supp., Title 26, Sections 1058, 1061."

The Government contended that the above quoted section was confined in its scope and application to suits to collect taxes *qua* taxes, since, by its terms, it states that "such taxes may be collected, etc." whereas the suit at issue was one to recover "trust funds". In denying this distinction under the facts before it, this court stated, at p. 494:

> "It seems plain enough, without stopping to cite authority, that the present suit, though not against the corporation but against its transferees to subject assets in their hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax. The tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees. The aim in the one case, as in the other, is to enforce a tax liability; and the effect of the language above quoted from Section 280 is to read into that section, and make applicable to the transferee equally with the original taxpayer, the provision of Section 278 (d) in relation to the period of limitation for the collection of a tax. Indeed, when used to connote payment of a tax, it puts no undue strain upon the word 'taxpayer' to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax."

Similarly, in the present case, since the suit is brought to recover a "tax . . . which has been erroneously refunded", how can it be said in the same breath that this is not a suit to recover a tax which has been erroneously refunded? Certainly it would be hard to convince such a person (as the defendant) that he had not paid a tax.

Respondent submits that the reason for the rule favoring the taxpayer is fully present.

CONCLUSION.

The judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX A.

Revenue Act of 1921, c. 136, 42 Stat. 227:—

SEC. 252. REFUNDS.—That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer:

Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer:

Provided further, That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the Revenue Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any

previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section:

And provided further, That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under subdivision (a) of section 14 of the Revenue Act of 1916, or filed prior to the passage of this Act under section 252 of the Revenue Act of 1918.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. CREDITS AND REFUNDS.

* * * * * * * * *

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

* * * * * * * * *

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on Allowance.*—

(1) PERIOD OF LIMITATION.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND. The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

* * * * * * * * *

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after May 29, 1928) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after May 29, 1928, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after May

29, 1928, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

SEC. 609. ERRONEOUS CREDITS.

(a) CREDIT AGAINST BARRED DEFICIENCY. Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) CREDIT OF BARRED OVERPAYMENT. A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) APPLICATION OF SECTION. The provisions of this section shall apply to any credit made before or after May 29, 1928.

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after May 29, 1928, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 322. REFUNDS AND CREDITS.

* * * * * * * *

(b) LIMITATION ON ALLOWANCE.—

(1) PERIOD OF LIMITATION.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

* * * * * * * *

(d) OVERPAYMENT FOUND BY BOARD.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be

credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax paid more than two years before the filing of the claim or the filing of the petition, whichever is earlier.

* * * * * * * *

SEC. 1104. DATE OF ALLOWANCE OF REFUND OR CREDIT.

Where the Commissioner has (before or after the enactment of this Act) signed a schedule of overassessments in respect of any internal revenue tax imposed by this Act or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax. (U. S. C., Title 26, Sec. 1670.)

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 322. REFUNDS AND CREDITS.

* * * * * * * *

(b) LIMITATION ON ALLOWANCE.—

(1) PERIOD OF LIMITATION—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—The amount of the credit or refund shall not exceed the portion of the tax paid during the three

years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

* * * * * * * *

(d) OVERPAYMENT FOUND BY BOARD.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid within three years before the filing of the claim or the filing of the petition, whichever is earlier.

APPENDIX B.

Excerpt from Committee Report:

S. Rep. No. 665, 72d Cong., 1st Sess., pp. 57-58:

SEC. 1104. DATE OF ALLOWANCE OF REFUND OR CREDIT.

Under the practice once prevailing in the Bureau of Internal Revenue the commissioner first signed a schedule of overassessments, which fixed the amount of the taxpayer's overassessment, and later, after the collector had made appropriate adjustments to the taxpayer's account in accordance with this schedule, signed a schedule of refunds and credits, which formally approved the action so taken and directed the making of any money payments due the taxpayer. In recent years the schedule of refunds and credits has been abandoned; the commissioner's final action consists in signing the schedule of overassessments, which in itself contains complete directions as to the further steps to be taken toward abating, crediting, or refunding the overassessments entered on the schedule. Some question has arisen as to whether certain court decisions, rendered upon the basis of the previous practice and holding that the allowance of the refund or credit takes place upon the signing of the second schedule, are applicable under the new practice. The provisions of this section, added by your committee, establish a rule which accords with the practice of the Treasury and permits the allowance of refunds and credits with the minimum of difficulty to the Government and the taxpayers as well. It protects the interests of the small taxpayers particularly, who may not learn of any refund or credit which may properly be due them in sufficient time to file a claim and may lose the benefit thereof unless the commissioner by signing the schedule of overassessments can

make the allowance within the statutory period. In order to settle any question as to the commissioner's allowance of a number of small refunds and credits in cases recently arising, your committee has made the provisions of this section retroactive to the date of the enactment of the 1928 act.

SUPREME COURT OF THE UNITED STATES.

No. 499.—October Term, 1937.

The United States of America, Petitioner, *vs.* Robert K. Wurts.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 14, 1938.]

Mr. Justice Black delivered the opinion of the Court.

Under the Revenue Act of 1928,[1] forbidding suit by the United States to recover an erroneous tax refund unless brought "within two years after the making of such refund," does the two year limitation begin when the refund is allowed or when it is paid?

The Court of Appeals affirmed[2] the District Court's judgment holding the Government barred by this limitation because the present suit was not brought within two years after the Commissioner allowed the refund by signing the schedule of over-assessments.

The facts show that:

March 15, 1932, the Commissioner erroneously approved a refund of taxes paid by respondent for the year 1929. April 30, 1932, a check was mailed to the taxpayer for this erroneous refund. April 26, 1934, more than two years after the allowance of the refund, but less than two years after actual payment, the Government brought this suit to recover the erroneous refund.

The Government by apropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid.[3] "No statute is necessary to authorize the United States to sue in such a case. The right to sue is independent of statute, . . ." *United States* v. *Bank of the Metropolis*, 15 Pet. 377, 401. Section 610 of the 1928 Act, relied upon as barring recovery of this erroneous and

[1] Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 610.

[2] 91 F. (2d) 547; certiorari granted, — U. S. —.

[3] Wisconsin Central Railroad *v.* United States, 164 U. S. 190, 212; see United States *v.* Burchard, 125 U. S. 176, 180, 181.

unwarranted tax refund, does not grant the Government a new right, but is a limitation of the Government's long-established right to sue for money wrongfully or erroneously paid from the public treasury. Ordinarily, recovery of Government funds, paid by mistake to one having no just right to keep the funds, is not barred by the passage of time.[4] There is no contention here that respondent has any right to retain this refund erroneously paid by the Government. His defense is that the statutory bar prevents recovery. The Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has "clearly manifested its intention"[5] to raise a statutory barrier.

Section 610—urged by respondent as a statutory barrier—requires that the Government bring suit "before the expiration of two years *after the making of such* [*erroneous*] *refund.* . . ." Respondent contends that the Revenue Act of 1932[6] indicated Congressional intent to designate the date of *allowance* of a refund (the date the Commissioner signs the schedule of over-assessments) as the date of refund for computing the period of limitations under Section 610. The 1932 Act provides:

"Where the Commissioner has (before or after June 6, 1932) signed a schedule of over-assessments in respect of any internal revenue tax imposed by [the Revenue Act of 1932] or any prior Revenue Act, the date on which he first signs such schedule (if after May 28, 1928) shall be considered *as the date of allowance* of refund or credit in respect of such tax." This Act in no manner relates to limitations on suits for erroneous refunds. It has no purpose in common with Section 610 of the 1928 Act. The 1932 Act throws no light on the meaning of Section 610.

Section 610 is clear when its words are given their commonly accepted import. "Congress may well be supposed to have used language in accordance with the common understanding."[7] Webster's New International Dictionary (2d Ed., Unabridged) defines "refund" as "that which is refunded" and defines the transitive

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[4] Grand Trunk Western Railway Co. *v.* United States, 252 U. S. 112, 121.

[5] Compare, United States *v.* Nashville, etc., Railway Co., 118 U. S. 120, 125.

[6] Revenue Act of 1932, c. 209, 47 Stat. 169, Section 1104.

[7] Union Pacific R. R. Co. *v.* Hall, 91 U. S. 343, 347.

verb as: "to return (money) in restitution, repayment . . ." Only by ignoring the common understanding of words could "making . . . (a) refund" be considered synonymous with "allowing a refund."

That Congress had in mind the separate and distinct meanings of these two expressions is clearly demonstrated in House Report No. 2, 70th Congress, 1st Session, pages 34, 35, containing the Commitee Report on the Revenue Act of 1928:

"The section (610) provides that any erroneous refund, . . . may be recovered by suit brought in the name of the United States if such suit is begun within two years *after the making of the refund.*"

Immediately following, in referring to Section 614, the Report stated:

"The principal change made in existing law is that in the case of a refund the interest period now terminates *with the allowance of the refund, a date which often precedes the actual making of the refund* . . ."

The Commissioner's signature on a schedule of over-assessments does not finally establish a claimant's right to a refund and does not preclude further investigation and consideration of the claim. The Commissioner could later take his signature from the schedule and as pointed out by this Court might—even after a check was signed and mailed—cancel the payment and revoke the authority of payment erroneously made.[8]

It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued. Obviously, the Government had no right to sue this taxpayer to recover money before money had been paid to him. The construction urged by respondent would allow the statute of limitations to begin to run against recovery on an erroneous payment before any such payment is made. As said by a House Committee in reporting on a statute of limitations contained in a revenue act,[9] "Logically the period of limitation should run from the date of payment, since it is at that time that the right accrues."

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[8] Daube *v.* United States, 289 U. S. 367, 372.

[9] House Report No. 179, 68th Congress, 1st Session, page 27.

We are of opinion that Congress did not intend the limitations of Section 610 to run against the Government until the Government's right "has accrued in a shape to be effectually enforced."[10] This statute does not begin to run against the Government when a claim is erroneously allowed. It begins to run from the date of payment. The judgment below is not in accord with this construction of the statute and is

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[10] Cf., Borer v. Chapman, 119 U. S. 587, 602.